

March 8, 1999

D.T.E. 97-95

Investigation by the Department of Telecommunications and Energy, on its own motion,
into Boston Edison Company's compliance with the Department's Order in D.P.U. 93-37.

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INTERLOCUTORY ORDER: (1) DENYING MASSACHUSETTS OILHEAT COUNCIL'S APPEAL OF THE HEARING OFFICER RULING ON LATE-FILED PETITION TO INTERVENE; AND (2) DENYING COMPETITION POLICY INSTITUTE'S LATE-FILED PETITION FOR LIMITED PARTICIPANT STATUS

I. INTRODUCTION

On October 10, 1997, the Department of Telecommunications and Energy ("Department"), on its own motion, opened an investigation into Boston Edison Company's ("BECo") compliance with the Department's Order in Boston Energy Company, D.P.U. 93-37 (1993), and BECo's investment in Boston Energy Technology Group ("BETG"). Order Opening Investigation of BECo's Compliance with D.P.U. 93-37, D.P.U./D.T.E. 97-95 (1997). In that Order, the deadline for intervention was set for October 28, 1997.⁽¹⁾ Numerous petitions to intervene were received by the deadline.⁽²⁾

On November 11, 1998, the Massachusetts Oilheat Council, Inc. ("MOC") filed a Petition for Leave to Intervene as a Limited Participant ("MOC Petition").⁽³⁾ On November 16, 1998, Boston Edison Company filed its Opposition to MOC's Petition ("Opposition"). On November 17, 1998, the hearing officer issued a ruling denying MOC's Petition.⁽⁴⁾ MOC appealed the ruling on November 23, 1998 ("MOC Appeal"). In addition, on November 23, 1998, Competition Policy Institute ("CPI") filed a Petition for Leave to Participate as a Limited Participant ("CPI Petition") in the proceedings. On this same date, BECo filed its Opposition to CPI's Petition. In this Order, the Department rules on MOC's appeal of the hearing officer ruling; the Department also rules on CPI's late-filed Petition.

II. APPEAL OF MOC

A. Hearing Officer Ruling

In its Petition, MOC asserted that it represents independent marketers, distributors and retailers of energy and other products and services (MOC Petition at 1). MOC stated that its members engage in the sale and installation of various unregulated products and services to customers located through Massachusetts (id. at 3). MOC stated that the reason for its late-filing was that it only recently became aware of the proceeding (id. at 4).⁽⁵⁾ MOC claimed that its members are substantially and specifically affected by the Department's ruling in this proceeding, therefore MOC desired to protect its members' interests by participating in the present proceeding (id. at 3-4).

In its Opposition, BECo argued that MOC's Petition should be denied because it comes more than one year after the intervention deadline with no justification for this lateness (Opposition at 1). Additionally, BECo argued that MOC has failed to show how it is

substantially and specifically affected by the issues under investigation in the present case (*id.*). On November 17, 1998, the hearing officer issued a ruling denying MOC's Petition, in which she stated that MOC failed to demonstrate good cause for the lateness of its filing (Hearing Officer Ruling at 8). As a result, the hearing officer denied MOC's Petition. Pursuant to 220 C.M.R. § 1.06(6)(d)3, MOC appealed the ruling on November 23, 1998.

B. Position of MOC

In its Appeal, MOC argues that the hearing officer ruling is in error because the Department may only deny a late-filed petition to intervene when granting such would risk undue delay or disruption to the orderly conduct of the proceeding (Appeal at 3-4). MOC states that granting its Petition would not delay or disrupt the orderly process of the proceeding, and therefore, the hearing officer ruling should be overturned (*id.* at 6).

MOC also argues that the denial of its Petition does not serve any rational public policy (*id.* at 7). MOC contends that there is "clearly no public interest served by creating artificial barriers or obstacles which, for no discernable or rational reason, act to preclude, prohibit or hinder interested parties from actively participating in important and far reaching proceedings" (*id.*). MOC states that, in light of deregulation, the Department instead should apply a liberal intervention policy based on criteria such as contribution of the intervening party, burden or prejudice of granting a petition, and the public interest (*id.* at 9). Finally, MOC asserts that denial of its Petition is unconstitutional (*id.* at 8). By denying its late-filed Petition, MOC argues, the Department has restricted access to a limited group of parties, and has ignored the contribution to be made by others (*id.*). This behavior, according to MOC, is illegal and detrimental to the best interests of the public (*id.*).

C. Standard of Review

The Department's regulations require that a petition to intervene describe how the petitioner is substantially and specifically affected by a proceeding. 220 C.M.R. § 1.03(1)(b); *see also* G.L. c. 30A, § 10. In interpreting this standard, the Department has broad discretion in determining whether to allow participation, and the extent of participation, in Department proceedings. Attorney General v. Department of Public Utilities, 390 Mass. 208, 216 (1983); Boston Edison Company v. Department of Public Utilities, 375 Mass. 1, 45 (1978) (with regard to intervenors, the Department has broad but not unlimited discretion), cert. denied, 439 U.S. 921 (1978); *see also* Robinson v. Department of Public Utilities, 835 F. 2d 19 (1st Cir. 1987). The Department may allow persons not substantially and specifically affected to participate in proceedings for limited purposes. G.L. c. 30A, § 10; 220 C.M.R. § 1.03(1)(e); Boston Edison, 375 Mass. at 45. A petitioner must demonstrate a sufficient interest in a proceeding before the Department will exercise its discretion and grant limited participation. *Id.* The Department is not required to allow all petitioners seeking intervenor status to participate in proceedings. *Id.*

The deadline for filing a motion to intervene or to participate in a Department proceeding is set out in the Order of Notice, which provides a brief description of the procedure and prescribes the time, manner, and frequency of publication of notice to the general public or to any specific class of persons designated by statute or by Department rule. Given legally sufficient notice (see Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) ("An elemental . . . requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action. . . .")), potentially interested persons may reasonably be presumed to be aware of and to respond to such notice. In the interest of fairness, the Department may allow late-filed petitions to intervene in a noticed proceeding, upon a showing of good cause.

In ruling on late-filed petitions to intervene or otherwise participate in its proceedings, the Department takes into account a number of requirements and factors in its analysis. First, as noted, the Department considers whether a petitioner has demonstrated good cause for late-filing. See 220 C.M.R. § 1.01(4). While "good cause" may not be readily susceptible of precise definition, the proponent of a waiver must make a convincing showing of good cause in the first instance to the hearing officer acting under G.L. c. 25, § 4, and may not reserve such a showing for a later appeal of the Hearing Officer's ruling to the Commission. See Bay State Gas Company, D.P.U. 95-52, at 2, Interlocutory Order (July 21, 1995). Administrative efficiency requires that a proponent of a waiver state all available grounds at the time the ruling is requested. If the Department finds that there is good cause and that the petitioner is substantially and specifically affected, then the Department balances the extent of participation against the need to conduct a proceeding in a complete, efficient, and orderly fashion.⁽⁶⁾ D. Analysis & Findings

MOC's petition and subsequent amendment were 54 weeks late. The hearing officer was correct in finding that MOC failed to show good cause for its late filing. Notice of the proceeding was adequate. A review of the published legal notice in this proceeding shows that it was reasonably calculated and sufficient to call to the attention of any person, potentially interested in the matter, the nature of the proceeding and its threshold procedural requirements. See Mullane, 339 U.S. 306, 314. While there may occasionally be good cause for failure to respond to a public notice, good cause must be shown through adequate pleading of circumstances and reason the first time the pleading is made (*i.e.*, to the Commonwealth or to the hearing officer designated under G.L. c. 25, § 4). MOC has made no such showing.

MOC's argument is that late-filed petitions to intervene may be denied only when granting such leave would risk undue delay or disrupt the proceeding (Appeal at 4-5). This is an inaccurate assessment of the standard. As correctly stated above, the standard takes into account a number of requirements and factors in its analysis.⁽⁷⁾

Contrary to MOC's argument that denial of its Petition due to lateness does not serve any rational public policy, standards for procedural timeliness are essential to efficient management of the Department's overall docket and to particular cases. Without such

procedural rules, much of the Department's time and resources could be consumed with addressing petitions to intervene at any point during a case. Moreover, the parties to a proceeding are entitled to early certainty regarding the identity of all participants to that proceeding.

With respect to MOC's argument that denial of its Petition is illegal because such action restricts access to a limited group of parties, we find that such argument is without merit. Any group or individual may petition the Department for leave to intervene in a case. Regardless of whether a petition is granted, any group or individual may attend hearings in a case, may file comments for inclusion in the public docket, and may request to be placed on the Department's service list.

Finally, with respect to MOC's argument that denial of its Petition amounts to an unconstitutional deprivation of property without due process of law (MOC Appeal at 8), we also find this argument without merit. MOC's property right claim is an unsupported assertion. No argument and no citation to caselaw are adduced to underpin this claim. We are not aware of any constitutional basis for MOC's participation, and MOC has failed to cite any such basis.

Thus, as no acceptable or persuasive reason was given in MOC's Petition, the hearing officer was correct in finding a failure to show good cause. See Investigation of Recovery of Gas Transition Costs, D.P.U. 94-104-B at 6-8 (1995). The hearing officer's ruling is upheld and accordingly, MOC's appeal is denied.

III. CPI'S LATE-FILED PETITION TO INTERVENE AS A LIMITED PARTICIPANT

A. Position of the Parties

CPI states that it is an independent organization that advocates state and federal policies that promote competition for energy and telecommunication services in ways that benefit consumers (CPI Petition at 1). The Company states that it has an interest in the present proceeding because of the significant implications for competition and consumers in both the telecommunications and electric industries (*id.* at 2). CPI further states that its expertise in both these industries will be of a significant value to the Department as it considers the pending complaints (*id.*).

BEC_o, in its Opposition, argues that CPI's Petition should be denied because it was filed over one year after the deadline to intervene, and CPI provides no justification for its lateness (Opposition at 1). BEC_o also argues that CPI has failed to explain how it is substantially and specifically affected by the issues under investigation in this proceeding (*id.*). B. Analysis and Findings

The Department finds that CPI has failed to show good cause for its late filing. See Cambridge Electric Light Company/Commonwealth Electric Company/Canal Electric Company, D.T.E. 98-78/83, Interlocutory Order Denying Harvard College's Appeal of Hearing Officer Ruling, (October 26, 1998). Therefore, CPI's Petition is denied. As noted above, any interested person may request to be placed on the Department's service list in order to receive copies of notices, rulings and any interested person may file comments with the Department for placement in the public docket at any time in the course of a proceeding.

IV. ORDER

Accordingly, after due consideration, it is hereby

ORDERED: That the Massachusetts Oilheat Council's Appeal from the Hearing Officer's Denial of Petition to Intervene as a Limited Participant is denied, and it is

FURTHER ORDERED: That the Competition Policy Institute's Petition to Intervene as a Limited Participant is denied.

By Order of the Department,

Janet Gail Besser, Chair

James Connelly, Commissioner

W. Robert Keating, Commissioner

Paul B. Vasington, Commissioner

Eugene J. Sullivan, Jr., Commissioner

1. Notice was published in the Boston Globe and Boston Herald on October 24, 1997. In addition, the Department served a copy of the notice by mail to the service lists for D.P.U. 93-37, D.P.U. 97-63, and D.P.U./D.T.E. 97-95.

2. The Attorney General of the Commonwealth filed a notice of intervention as of right pursuant to G.L. c. 12, §11E. In addition, the Department received petitions for leave to intervene from: Cablevision Systems Corporation; Commonwealth of Massachusetts Division of Energy Resources; Eastern Edison Company; Enron Capital and Trade Resources; Local 369, Utility Workers Union of America, AFL-CIO; Low-Income Intervenor; New England Cable Television Association; and RCN-BecoCom. These petitions were all granted, with the exception of Eastern Edison Company and Low-Income Intervenor, which were granted limited participant status. The following entities filed petitions for limited participant status in the proceeding: Bay State Gas Company;

Cambridge Electric Light Company and Commonwealth Electric Company; and Western Massachusetts Electric Company, which were also granted.

3. MOC initially requested leave to participate as a full party but subsequently amended its request.

4. Boston Edison Company, D.P.U./D.T.E. 97-95, at 8 (Hearing Officer Ruling: (1) Granting Cablevision System Corporation's motion to compel with regard to information request CSC-2-35; (2) Granting BECO's request to file rebuttal testimony; (3) Denying late-filed petitions to intervene as limited participants; and (4) Proposing hearing schedule). In this ruling, the hearing officer also denied the late-filed Petitions to Intervene as Limited Participants of MASSPIRG and Consumer Federation of America, both of which filed their Petitions on October 8, 1998; Massachusetts Electric Company, which filed on September 22, 1998; and New Energy Ventures East, which filed on November 5, 1998.

5. MOC states that the Department opened this case on October 10, 1998 (MOC Petition at 2). The actual date, however, was October 10, 1997. MOC also states that the deadline for filing petitions for leave to intervene in this case was October 28, 1998 (id. at 4). The actual deadline to file was October 28, 1997.

6. ⁶ When balancing these factors, the Department has considered (1) the extent of the delay, (2) the effect of the late participation on the ongoing proceeding, and (3) the explanation for the tardiness. Western Massachusetts Electric Company, D.P.U. 92-8C-A at 5 (1993); NYNEX, D.P.U. 94-50, at 3 (1994).

7. The factors that MOC suggests including in its intervention policy, such as the contribution of would-be intervenors, the burden of granting late-filed petitions to intervene, and the public interest (Appeal at 9), are indeed taken into account by the Department when ruling on such a petition, as has been discussed above.